Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

JOHN F. PEOPLES,
Petitioner,

v.

DISCOVER FINANCIAL SERVICES, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the term "public accommodation" in Title III of the federal Americans with Disabilities Act is limited to a physical site owned by the defendant, or whether the term has a broader meaning, as found by some circuits, to apply to credit card companies.

II. Whether Section 504 of the Rehabilitation Act of 1973, 29 USC § 705(20) applies to companies receiving federal money in the recent bank "bailouts."

PARTIES TO PROCEEDING

The Petitioner on this Petition is the individual John F. Peoples. The Respondent on this Petition is a credit card company, Discover Financial Services, Inc. a/k/a Discover Card Services, Inc. a/k/a DFS Services LLC. There is no known parent or publicly held company owning 10% or more of any party-corporation's stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at *John F. Peoples v. Discover Financial Services, Inc., et al.*, 2010 U.S. App. LEXIS 14702, *; 23 Am. Disabilities Cas. (BNA) 1007. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at *John F. Peoples v. Discover Financial Services, Inc., et al.*, 2009 U.S. Dist. LEXIS 87184.

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit, affirming the decision of the District Court's Orders was handed down on July 19, 2010. A timely Petition for Rehearing was denied on August 17, 2010. This Court has Jurisdiction pursuant to 28 USC § 1254(1).

RELEVANT PROVISIONS INVOLVED

Americans With Disabilities Act, 42 USC § 12182

Section 504 of the Rehabilitation Act of 1973, 29 USC § 705(20)

STATEMENT

Petitioner John F. Peoples ("Peoples") is and has been since birth legally and permanently blind. His blindness is so severe he cannot operate a motor vehicle or perform other normal daily routines requiring sight. He uses a special cane to walk specially made for the blind. His daily activities are substantially affected by his blindness. At all relevant times, Peoples was a member, cardholder and customer of Respondent Discover Financial Services Inc. a/k/a Discover Card Services, Inc. a/k/a DFS Services LLC (hereinafter "Discover"), which issued him a "Discover Card," which is Discover's brand of credit card. Peoples regularly used his Discover Card for consumer purchases.

At all relevant times, Ginger Dayle ("Dayle") was a merchant for Discover and regularly accepted Discover Cards from her clients. She regularly saw clients in her apartment unit in the City of Philadelphia, Pennsylvania, USA, which was used as a studio and place of business where she regularly serviced clients. She had many other regular clients, whom she saw and serviced in her unit.

Peoples had been a client of Dayle for many months prior to October 2007 and regularly used the Discover Card to pay for her services. In and around October and November 2007, Dayle committed theft by deception upon Peoples, using his blindness to overcharge his credit card. Dayle told Peoples that the amount on the receipt he was signing was $375 when in fact it was $1100 or $1600. Peoples signed the

receipt because his blindness prevented him from realizing that he was being defrauded. This occurred on numerous occasions in October and November 2007, resulting in over $8,000 stolen from Peoples by this method.

When Peoples received his credit card statement from Discover Card for the October–November 2007 billing cycle, he discovered (since he has a person to read his billing statements for him) that he had been defrauded, that Ginger Dayle had told him the receipt said $375 when in fact it had said $1100 or $1600. Upon this discovery, Peoples promptly notified Discover, challenged the $8,000 in charges and informed Discover of the fraud.

Discover, despite the claims, made the affirmative decision to pay the money over to Dayle and refused to charge back or take any action against Dayle. Discover refunded none of the money to Petitioner. The reason given for refusing the refund was that there were signed receipts. Discover chose not to consider in their decision the fact that Peoples is blind and was signing a receipt that misrepresented to him. Discover was aware of Petitioner's blindness/disability and yet failed to make reasonable accommodation for him, either generally or in this specific case.

Discover's fraud investigation consisted only of looking to see if there were signed receipts. Since there were signed receipts, Discover concluded there was no fraud and paid the money to Dayle. Discover

admitted that it never took Peoples' blindness into account when reviewing the receipts.

There was an easy accommodation to be made: simply take Peoples' blindness into account; not end the investigation when the signed receipts are shown. The fact that she told him $375 was on the receipt when she had charged $1600, and he signed it because he is blind and cannot see the receipt, should have been at least considered in the fraud investigation. It was Discover's policy and procedure to end the fraud investigation when signed receipts are shown and to ignore the fact that the signer is blind and could have been defrauded.

Discover claimed it accommodated the blind by having a 24-hour hotline to get information about charges, so that Peoples could have called soon after his transaction to confirm whether he was rightly charged. But that changes nothing. Even if, five minutes after the transaction, Peoples called and challenged the charge, it would still need to go through the same fraud investigation process, and the outcome would have been the same, with the money paid to Dayle because there was a signed receipt.

Discover, after its fraud investigation, made the decision to pay all the disputed amounts to the merchant Dayle and refund nothing to its customer Peoples, solely because the receipts were signed. Discover did not factor in Peoples' blindness, which made him unable to see what he was signing.

Peoples claims that the ADA's duty to provide reasonable accommodations would require Discover to take its customer's blindness into account when conducting its fraud investigation.

REASONS FOR GRANTING THE PETITION

AMERICANS WITH DISABILITIES ACT SHOULD APPLY BEYOND MERE PHYSICAL PREMISES

CERTIORARI REVIEW IS WARRANTED IN THIS CASE because there is a split among the federal circuit courts of appeals. The District Court dismissed Peoples' ADA Title III claim on the grounds that Peoples was not on the physical property of Discover at the time. The Court found that Discover would only have to provide reasonable accommodations if the incident occurred on the Discover's own premises. In other words, the Court ruled that Title III of the ADA should be used solely for removing physical barriers from a retail outlet, and should not apply to the Internet, the airwaves, phones, faxes, or elsewhere. Given the technological advances in the world, such a narrow application of the ADA will render it irrelevant in the future.

> In order to establish a violation under the ADA, a [plaintiff] must demonstrate that (1) she is a qualified individual with a disability; (2) that the defendants are subject to the ADA; and (3) that Petitioner was denied the opportunity to participate in or benefit from defendants'

> services, programs, or activities, or was otherwise discriminated against by defendants, by reason of Petitioner's disability.... Our analysis of the requirements of a reasonable accommodation claim begins with the Supreme Court's opinion in Choate. There . . . the Court suggested that the relevant inquiry asks not whether the benefits available to persons with disabilities and to others are actually equal, but whether those with disabilities are as a practical matter able to access benefits to which they are legally entitled. The Court explained that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. To assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made. The Second Circuit explained, therefore, that the demonstration that a disability makes it difficult for a Petitioner to access benefits that are available to both those with and without disabilities is sufficient to sustain a claim for a reasonable accommodation.

Wendel v. New York, 574 F. Supp. 2d 290 (E.D.NY. 2008).

Discover made no reasonable accommodations to Peoples in its fraud investigation, and refused to

take his blindness into account when analyzing the signed receipts. All Discover looked at was whether the receipts were signed; since they were signed, it found in merchant's favor. It did not take into account the fact they were signed by a blind person who could not see what he was signing.

The District Court found that no reasonable accommodations were required because Title III of the ADA does not apply to this case, because Peoples was not on the physical premises of Discover at the time of the incident. The District Court stated that the term "public accommodation" in Title III of the ADA means a physical site owned by the defendant, citing *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998). While it is admitted that the *Ford* case is controlling in the Third Circuit, Peoples argues that there is a split in the circuits and the trend is toward expanding the definition of "public accommodation." Therefore, it is a good time for the Third Circuit to reconsider its position on this. *Ford* does not need to be explicitly overruled, but it can be clarified in a way that allows Petitioner's ADA claims to exist.

The federal Courts have identified the importance of blind people having "meaningful access" to money and currency. That means being able to use money without asking for help. See *Am. Council of the Blind v. Paulson*, 463 F.Supp.2d 51, 62 (D.D.C. 2006) ("there was a time when disabled people had no choice but to ask for help -- to rely on the kindness of strangers... it can no longer be successfully argued that a blind person has meaningful access to currency

if she cannot accurately identify paper money without assistance").

Credit cards are advantageous to the blind exactly for that reason. No assistance is needed to give the merchant the proper amount. The blindness only comes into play where the receipt is signed, for the receipt confirms the right amount has been charged. That is the area where the blind can be defrauded, if the receipt shows a different amount than agreed upon. There are two ways to overcome this: (1) force the blind person to hire a sighted person to follow him around all day reading his receipts, or (2) have an exception to the credit card's fraud procedure to further investigate receipts signed by the blind.

"[C]redit cards do not provide an adequate substitute because they have not replaced cash in many daily transactions and may pose challenges similar to those posed by paper currency if the visually impaired cannot verify the charged amounts stated in the receipts." *Am. Council of the Blind v. Paulson*, 381 U.S.App.D.C. 162, 525 F.3d 1256 (D.C.Cir. 2008).

On the New York State Attorney General's website, there is news of a nationwide agreement with credit card company HSBC to provide reasonable accommodations to its blind customers in fraud disputes. The act of putting the wrong amount on a receipt is going to happen on the rare occasion. It would be a tremendous waste of time and money to force the blind to hire a sighted "receipt reader" to follow them around all day. Much more logical is,

when a fraud complaint does arise, to merely provide the very reasonable and inexpensive accommodation of investigating beyond the question of whether the receipt was signed.

"The visually impaired can hardly be empower[ed] to maximize [their] employment, economic self-sufficiency, independence, and inclusion and integration into society," 29 U.S.C. § 701 (b)(1), if in everyday transactions they cannot use the paper currency that they possess without the assistance of third persons. Where the basic task of independently evaluating the worth of currency in excess of 99 cents is difficult or impossible, the visually impaired are forever relegated to depend on "the kindness of strangers" to shop for groceries, hire a taxi, or buy a newspaper or cup of coffee. We need not define precisely the severity of the deprivation that a plaintiff must experience in accessing a program, benefit, or service to demonstrate a denial of meaningful access. As sister circuits have recognized by requiring public infrastructures to be wheelchair accessible, see, e.g., *Ability Ctr.*, 385 F.3d 901; *United States v. Board of Trustees for University of Alabama.*, 908 F.2d 740 (11th Cir. 1990); *Dopico*, 687 F.2d 644, the Rehabilitation Act's emphasis on independent living and self-sufficiency ensures that, for the disabled, the enjoyment of a public benefit is not contingent upon the cooperation of third persons. On this record, the Secretary is hard-pressed to overcome the Council's showing that the visually impaired are denied meaningful access to U.S. paper currency, and his attempts to do so are unpersuasive"

Am. Council of the Blind v. Paulson, 381 U.S.App.D.C. 162, 525 F.3d 1256 (D.C.Cir. 2008).

> [C]oping mechanisms and alternate means of participating in economic activity do not address the scope of the denial of access that the Council has shown. The Secretary's argument is analogous to contending that merely because the mobility impaired may be able either to rely on the assistance of strangers or to crawl on all fours in navigating architectural obstacles, cf. *Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004), they are not denied meaningful access to public buildings, see, e.g., *Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850 (10th Cir. 2003); cf. *United States v. Edward Rose & Sons*, 384 F.3d 258 (6th Cir. 2004). Such dependence is anathema to the stated purpose of the Rehabilitation Act, 29 U.S.C. § 701(b); see also *J.D. v. Pawlet Sch. Dist.*, 224 F.3d at 70, and places the visually impaired at a distinct disadvantage in two-way transactions involving paper currency because they can neither control the actions of those with whom they deal nor independently discern whether the paper currency they receive is correct. Instead they are compelled to rely on the honesty and carefulness of sighted individuals who often are on the opposite side of a

> financial transaction.... the courts have recognized that the mere ability of the disabled to spend substantial sums of money to overcome obstacles attendant to a government benefit or program does not eliminate a denial of meaningful access...

Am. Council of the Blind v. Paulson, 381 U.S.App.D.C. 162, 525 F.3d 1256 (D.C.Cir., 2008).

Though *Paulson* is a § 504 case, involving a government agency, its reasoning is applicable to the Americans With Disabilities Act, 42 USC § 12182. "Because these provisions [§ 504 of the Rehabilitation Act and the ADA] involve the same substantive standards, we analyze them together." *Miller v. Bd. of Educ.*, 565 F.3d 1232 (10th Cir. 2009). See also *Urban ex rel. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 728 (10th Cir. 1996) ("We analyze [plaintiff's] ADA claim by reference to section 504's standards"). In terms of "the scope of the disability discrimination provisions," courts have found that § 504 of the Rehabilitation Act is "a precursor to the ADA." *Camarillo v. Carrols Corp.*, 518 F.3d 153 (2nd Cir. 2008).

There is currently a split among the circuit courts on the issue of the definition of public accommodation under Title III of the ADA. See *Noah v. AOL Time Warner Inc.*, 261 F. Supp. 2d 532 (E.D.Va., 2003) ("The circuits are split regarding the essential question whether a place of public accommodation under the ADA must be an actual concrete physical structure. On the one hand, as

plaintiff notes, the First Circuit has held that "places of public accommodation" under Title III of the ADA are not limited to actual physical facilities. See *Carparts Distribution Center, Inc. v. Automotive Wholesalers Assoc. of New England, Inc.*, 37 F.3d 12, 18-20 (1st Cir. 1994) (holding that a trade association which administers a health insurance program, without any connection to a physical facility, can be a "place of public accommodation"). n9 On the other hand, the Third, Sixth and Ninth Circuits, in similar cases involving health insurance programs, followed the logic of Welsh and Clegg in holding that places of public accommodation under Title III of the ADA must be physical places. See *Parker v. Metropolitan Life Insurance Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997) (holding that "the clear connotation of the words in § 12181(7) is that a public accommodation is a physical place," because "every term listed in § 12181(7) ... is a physical place open to public access"); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-13 (3d Cir. 1998) (holding that "the plain meaning of Title III is that a public accommodation is a place," and that § 12181(7) does not "refer to non-physical access"); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114-16 (9th Cir. 2000) (following *Parker and Ford*). Thus, it appears that the weight of authority endorses the "actual physical structure" requirement in the ADA context as well... In reaching this conclusion, the First Circuit in *Carparts* relied on the ADA's more expansive definition of "place of public accommodation," in particular its inclusion of a "travel service," "insurance office," and "other service establishments" as places of public accommodation *Id.* at 19; 42 U.S.C. § 12181(7). Focusing on these terms,

the First Circuit concluded that "Congress clearly contemplated that 'service establishments' include providers of services which do not require a person to physically enter an actual physical structure," and thus that the Title III of the ADA is not limited to "physical structures which person must enter to obtain goods and services." *Id.* at 19-20. Simply put, the *Carparts* court found it irrational to conclude that Title III of the ADA reaches those who enter an office to purchase insurance services, but not those who purchase them over the mail or by telephone. *Id.* at 19. Notably,Title II of the Civil Rights Act does not include a "travel service," "insurance office," or "other service establishments" in its definition, making the relevance of *Carparts* and its progeny to Title II questionable, at best... Yet, *Carparts* has not been completely abandoned. Indeed, some courts have continued to follow its holding and logic in cases involving health insurance programs, including a court in this district. See *Lewis v. Aetna Life Ins. Co.*, 982 F. Supp. 1158, 1164 (E.D.Va. 1997)... Most significantly, two more recent ADA cases involving fact situations much closer to those at bar reaffirm the principle that a "places of public accommodation," even under the ADA's broader definition, must be actual, physical facilities. In one case, the plaintiffs claimed that Southwest Airlines was in violation of the ADA because its "southwest.com" web site was incompatible with "screen reader" programs and thus inaccessible to blind persons. See *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1316 (S.D.Fla. 2002). Thus, the question presented was whether the airline's web site, which serves as an online ticket counter, constitutes a "place of public

accommodation" under the ADA. The Access Now court held that places of public accommodation under the ADA are limited to "physical concrete structures," and that the web site was not an actual physical structure. *Id.* at 1319. Rejecting the invitation to endorse the *Carparts* approach and apply the ADA to Internet web sites despite their lack of physical presence, the Access Now court concluded that "to expand the ADA to cover 'virtual' spaces would create new rights without well-defined standards." *Id.* at 1318. n11 Similarly, in another case, plaintiff contended that the defendant's digital cable system was in violation of the ADA because its on-screen channel guide was not accessible to the visually impaired. See *Torres v. AT&T Broadband, LLC*, 158 F. Supp. 2d 1035, 1037-38 (N.D.Cal. 2001). Here too, the district court rejected the notion that the digital cable system was a "place of public accommodation," because "in no way does viewing the system's images require the plaintiff to gain access to any actual physical public place," *Id.* at 1038 (citing *Weyer*, 198 F.3d at 1114-16). Furthermore, the Torres court sensibly concluded that the mere fact that the digital cable system relied on physical facilities to support and transmit its services did not convert the cable service into a "physical public place." *Id.* at 1038... But see *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (citing *Carparts* approvingly and stating, in dicta, that Title III of the ADA reaches "the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space)").

The split should be resolved in favor of expanding the scope of the ADA. Technology and civility will inevitably increase. The law must keep pace. It is no longer a question of whether the policies behind the ADA should be applied to an increasingly virtual world, but when. The sooner we put the mechanisms in place, the easier it will be down the line.

The *Ford* case was decided in 1998, twelve years ago. Much has happened since then. The reasoning of those circuit giving the more expansive definition of "public accommodation" is more applicable to today's world. See *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D.Ca. 2006):

> The case law does not support defendant's attempt to draw a false dichotomy between those services which impede physical access to a public accommodation and those merely offered by the facility. Such an interpretation would effectively limit the scope of Title III to the provision of ramps, elevators and other aids that operate to remove physical barriers to entry. Although the Ninth Circuit has determined that a place of public accommodation is a physical space, the court finds unconvincing defendant's attempt to bootstrap the definition of accessibility to this determination, effectively reading out of the ADA the broader provisions

> enacted by Congress. In *Rendon*, even though the disabled individual did not contest the actual physical barriers of the facility in question, the Eleventh Circuit found that Title III was implicated because a "discriminatory procedure that deprived [the individual] of the opportunity to compete to be a contestant . . . at a place of public accommodation" was utilized. Rendon, 294 F.3d at 1281 (emphasis added) (internal citations omitted). Similarly, in the present action, plaintiffs have alleged that the inaccessibility of Target.com denies the blind the ability to enjoy the services of Target stores. The Ninth Circuit has stated that the "ordinary meaning" of the ADA's prohibition against "discrimination in the enjoyment of goods, services, facilities or privileges, is "that whatever goods or services the place provides, it cannot discriminate on the basis of disability in providing enjoyment of those goods and services." Weyer, 198 F.3d at 1115 (emphasis added). Defendant's argument is unpersuasive and the court declines to dismiss the action for failure to allege a denial of physical access to the Target stores.

The ADA was meant to be read expansively and to be a living document. See *Rendon v. Valleycrest Prods.*, 294 F.3d 1279 (11th Cir. 2002):

These cases... do not stand for the broad proposition that a place of public accommodation may exclude persons with disabilities from services or privileges performed within the premises of the public accommodation so long as the discrimination itself occurs off site or over the telephone. At most, they can be read to require a nexus between the challenged service and the premises of the public accommodation. That nexus is surely present here; Plaintiffs seek access to privileges provided in Defendants' theater. None of the insurance cases countenance, for example, refusal to let individuals in wheelchairs buy insurance policies so long as the company does so by declining to make telephone appointments with disabled customers... Defendants urge us to hold, in effect, that so long as discrimination occurs off site, it does not offend Title III. We do not believe this is a tenable reading of Title III; indeed, off-site screening appears to be the paradigmatic example contemplated in the statute's prohibition of "the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability." 42 U.S.C. § 12182(b)(2)(A)(i). There would be little question that it would violate the ADA for the Defendants to screen

potential contestants just outside the studio by refusing otherwise qualified persons because they were deaf or suffered from diabetes or HIV. To contend that Title III allows discriminatory screening as long as it is off site requires not only misreading the relevant statutory language, but also contradicting numerous judicial opinions that have considered comparable suits dealing with discrimination perpetrated "at a distance." For cases arising under the ADA, see, e.g., *Ferguson v. City of Phoenix*, 157 F.3d 668 (9th Cir. 1998) (hearing-disabled plaintiffs' ADA Title II challenge to 9-1-1 emergency response system that lacked TDD capacity n9); *Bartlett v. N.Y. State Bd. of Law Examiners*, 226 F.3d 69 (2d Cir. 2000) (dyslexic bar exam taker entitled to reasonable accommodations under Title II of ADA). For cases arising under the Civil Rights Act of 1964, see, e.g., *Rousseve v. Shape Spa for Health & Beauty, Inc.*, 516 F.2d 64 (5th Cir. 1975) (finding a violation where plaintiff's application to join health club was rejected on account of race); *Smith v. Young Men's Christian Ass'n of Montgomery, Inc.*, 462 F.2d 634 (5th Cir. 1972) (application to summer camp denied on account of race); *Stout v. Young Men's Christian Ass'n of Bessemer, Ala.*, 404 F.2d 687 (5th Cir.

1968) (application to join YMCA denied on account of race). None of these cases involved a physical barrier erected at the site of a public accommodation or public entity; rather, as in the present suit, they involve discriminatory screening methods used to deny access to a provided good, service, privilege or advantage.

The ADA should address the real needs of real Americans. See *Morgan v. Joint Admin. Bd.*, 268 F.3d 456 (7th Cir. 2001):

> The plaintiffs have, however, another string to their bow. They appeal to the public accommodations provisions of the Act (Title III), which forbid discriminating against disabled persons with respect to access to places of public accommodation. 42 U.S.C. § 12182(a); *PGA Tour, Inc. v. Martin,* 149 L.Ed.2d 904, 121 S.Ct. 1879, 1889-90 (2001). The defendant asks us to interpret "public accommodation" literally, as denoting a physical site, such as a store or a hotel, but we have already rejected that interpretation. An insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store. *Doe v. Mutual of Omaha Ins. Co.,* 179 F.3d 557, 558-59

(7th Cir. 1999); to the same effect, see *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994); *contra*, *Weyer v. Twentieth Century Fox Film Corp.*, *supra*, 198 F.3d at 1114-15; *Ford v. Schering-Plough Corp.*, *supra*, 145 F.3d at 612; *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1010-11 (6th Cir. 1997) (en banc). The site of the sale is irrelevant to Congress's goal of granting the disabled equal access to sellers of goods and services. What matters is that the good or service be offered to the public. *Doe v. Mutual of Omaha Ins. Co., supra*, 179 F.3d at 559; *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc., supra*, 37 F.3d at 19.

When it comes to making the United States a leading world power, the ADA is a big part of that. See *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994):

> Neither Title III nor its implementing regulations make any mention of physical boundaries or physical entry. Many goods and services are sold over the telephone or by mail with customers never physically entering the premises of a commercial entity to purchase the

> goods or services. To exclude this broad category of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.

The ADA is as American as it gets. The spirit of hardworking Americans drives it forward. See *Pallozzo v. Allstate Life Ins. Co.,* 198 F.3d 28 (2d Cir. 1999):

> Title III's mandate that the disabled be accorded "full and equal enjoyment of the goods, [and] services . . . of any place of public accommodation," *Id.*, suggests to us that the statute was meant to guarantee them more than mere physical access... We believe an entity covered by Title III is not only obligated by the statute to provide disabled persons with physical access, but is also prohibited from refusing to sell them its merchandise by reason of discrimination against their disability... We find no merit in Allstate's contention that, because insurance policies are not used in places of public accommodation, they

do not qualify as goods or services "of a place of public accommodation." The term "of" generally does not mean "in," and there is no indication that Congress intended to employ the term in such an unorthodox manner in Section 302(a) of Title III. Furthermore, many of the private entities that Title III defines as "public accommodations"--such as a "bakery, grocery store, clothing store, hardware store, [or] shopping center," 42 U.S.C. § 12181(7)(E), as well as a "travel service, . . . gas station, office of an accountant or lawyer, [or] pharmacy," *Id.* § 12181(7)(F)--sell goods and services that are ordinarily used outside the premises. On Allstate's interpretation, a bakery's refusal to sell bread to a blind person would fall outside the scope of the statute. We see no basis for reading the statute so narrowly. Cf. *Id.* § 12101(b) ("It is the purpose of this [Act] . . . to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . [and] to invoke the sweep of congressional authority . . . to address the major areas of discrimination faced day-to-day by people with disabilities"). See also *Access Now, Inc. v. Southwest Airlines Co.*,385 F.3d 1324 (11th Cir. 2004) ("the purely legal question of the application of Title III to Internet web sites is far from "beyond any doubt." In

addressing the question, we would be wading into the thicket of a circuit split on this issue.

SECTION 504 APPLIES TO THIS CASE BY REASON OF BAILOUT

Pursuant to Section 504 of the Rehabilitation Act of 1973, 29 USC § 705(20), Discover is required to provide reasonable accommodations to customers, which it failed to do in this case. Peoples included a claim under Section 504 in its original Complaint and opposed Discover's Motion for Summary Judgment to dismiss the Section 504 claim.

The District Court granted summary judgment on the grounds that: "there is no evidence that [Discover] is related to any executive agency... or that it received federal funds. Accordingly, as a matter of law, it is not subject to the requirements of the statute, and judgment must be granted in DFS's favor and against Plaintiff on the Section 504 claim."

However, Discover did receive federal funds. It received $1.2 billion from the federal government in the 2009 federal Bank Bailout. Therefore it should be under the purview of § 504 of the Rehabilitation Act.

The President of the United States recently referred to the Bank Bailout as equivalent to giving 308 million people root canals. (Transcript Excerpt, US President, State of the Union Address, January 27, 2010: "if there's one thing that has unified Democrats and Republicans, it's that we all hated the

bank bailout. I hated it. You hated it. It was about as popular as a root canal"). If the banks are asked to compensate the American public by being subject to § 504, it is a small price to pay.

The court below did not take the into account the fact that, under the recent government bailout where large sums of money were given to corporations such as Discover. Discover is now required to follow the Rehabilitation Act mandates. It must be accountable to the US taxpayers who bailed it out.

CONCLUSION

For the above and foregoing reasons, Petitioner John F. Peoples respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Attorney for Petitioner John F. Peoples

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-3991

JOHN F. PEOPLES,
Appellant

v.

DISCOVER FINANCIAL SERVICES, INC.;
DISCOVER CARD SERVICES, INC.,
trading as Discover Card;
GINGER DAYLE;
GINGER DAYLE PRODUCTIONS;
NEW CITY STAGE COMPANY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 08-cv-02024)
District Judge: Honorable Edmund V. Ludwig

Submitted Under Third Circuit LAR 34.1(a)
July 13, 2010

Before: RENDELL, JORDAN and GREENAWAY, JR., *Circuit Judges.*

(Filed: July 19, 2010)

OPINION OF THE COURT

JORDAN, *Circuit Judge*.

John F. Peoples appeals an order of the United States District Court for the Eastern District of Pennsylvania granting summary judgment in favor of Discovery Financial Services, Inc., now known as DFS Services LLC ("DFS"), on his claims under Title III of the Americans with Disabilities Act, 42 U.S.C. § 12182 ("ADA"), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as well as on his breach of contract claim against DFS. Peoples claims that DFS violated the ADA and the Rehabilitation Act by failing to provide reasonable accommodations and safeguards to credit card holders with vision impairments. He also claims that DFS breached its contract with him by failing to carry out a credit card fraud investigation in a reasonable manner. Because there are no genuine issues of material fact and DFS is entitled to judgment as a matter of law, we will affirm.

I. Background

Beginning in March 2007, Peoples, who is blind, began using a Discover credit card serviced by DFS to purchase sex from a prostitute named Ginger Dayle, who conducted her business in an apartment

in Philadelphia.[1] Following each session, Peoples gave his Discover credit card to Dayle, who charged the credit card and prepared a receipt for Peoples to sign. Although he could not see the amount Dayle had charged to his credit card, Peoples signed each receipt and kept a copy for himself. By November 2007, Peoples had purchased prostitution services from Dayle in this manner at least 34 times.

After reviewing his credit card billing statement for the October-November 2007 billing period with the assistance of his mother, Peoples noted eleven transactions for Dayle's services that he believed were over-billed, and, accordingly, he notified DFS of the over-billing. The transactions all occurred between October and November 2007 and included ten charges for $1,100 and one charge for

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[1] The charges were processed through "Ginger Dayle Productions, Philadelphia, Pennsylvania" (App. at 67); however, Peoples acknowledged the services as prostitution in his deposition in October 2008: "I paid her and she had sex with me and there was an understanding that it was a payment for sex." (App. at 36.) Peoples did not inform DFS that these were prostitution services when he disputed the charges. The complaint studiously avoided any reference to the exact nature of the services. It describes Dayle as a "service provider, providing personal, private sessions with clients for a predetermined per-session fee. She is not a doctor, nurse or licensed medical practitioner. She advertises herself at [sic] an expert at providing personal, hands-on service to individual customers in private sessions at a set rate." (App. at 17.) Peoples also failed to admit in his response to admissions and interrogatories that he was purchasing prostitution services. It was not until his deposition that he acknowledged he was buying sex.

$1,600. For each disputed transaction, Peoples claims that Dayle had told him that the receipt indicated that he was being charged "$375 or $750," when he was actually charged $1,100 in ten instances and $1,600 once. (Appellant's Op. Br. at 3.)[2] While Peoples disputes those charges from October to November, which allegedly exceeded his expected payments, he does not contest similar charges from March to September, even though he paid for Dayle's services in amounts in excess of $750, including $1,075 twice and $1,100 twice.[3] Peoples says that he is seeking to recover only the amount in excess of what he agreed to pay Dayle for sexual services.[4]

DFS investigated Peoples's claims and determined that there was not a sufficient basis to say there had been fraud in the billing.[5] It therefore

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[2] For simplicity, references herein to the Appellant's Amended Opening Brief are noted as "Appellant's Op. Br.".

[3] In that same period, Peoples also made payments of $375 once and $750 eighteen times.

[4] Of course, given that he is vague about what the agreed-upon amounts were, his concession is not entirely helpful. The record does not reveal how one would know whether the events of any individual session with Ms. Dayle were worth $375 or $750. Peoples is definite about one thing though: "[he] is not claiming in this lawsuit that merchant Dayle breached a contract by failing to perform sexual services up to snuff ... . [And he] is not claiming that Dayle's sexual technique did not justify her price." (Appellant's Op. Br. at 9-10.)

[5] As more fully discussed herein, DFS contacted Dayle to verify the disputed charges and she produced signed sales receipts

refused to credit his account for the amounts in dispute. Further, DFS noted that there were ways in which Peoples could have quickly found out the amounts that Dayle was billing his credit card. For example, DFS provides a 24-hour telephone service that any card holder can call to hear a list of recent transactions posted to the account by date, amount, and transaction type. In addition, that same telephone service provides callers with the option of connecting directly to a live customer service representative for information about recent transactions and the account in general. A member using that service also has access to pending credit authorizations that are posted as soon as a merchant submits the charge.

On April 18, 2008, Peoples filed the present action against DFS, alleging violations of the ADA, the Rehabilitation Act, and breach of contract.[6] The

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which, along with a written contract she had with Peoples for yoga and pilates services, and the history of the account, evidently prompted DFS to conclude that Peoples's complaints reflected a customer service dispute between him and Dayle, rather than fraud.

[6] Peoples also brought a claim 6 under the Pennsylvania Human Relations Act, 43 PA. STAT. ANN. § 951 ("PHRA"). The District Court granted summary judgment against him on that claim, but he has waived any appeal in that regard by failing to discuss the PHRA claim in his opening brief. *See Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Energey Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) ("An issue is waived unless a party raises it in its opening brief, and for those purposes a passing reference to an issue ... will not suffice to bring that issue before this court.") (citation omitted).

parties filed crossmotions for summary judgment, and, on September 22, 2009, the District Court granted summary judgment in favor of DFS and against Peoples on all claims. This timely appeal followed.

II. Discussion[7]

We exercise plenary review over an appeal from a grant of summary judgment, which means that we apply the same standard applicable in the District Court. *Lauren v. DeFlaminis*, 480 F.3d 259, 265-66 (3d Cir. 2007). Thus, we will affirm a grant of summary judgment if our review reveals that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.* at 266. In determining whether summary judgment is warranted, we review the facts in the light most favorable to the non-moving party, and draw all reasonable factual inferences in that party's favor. *Id.*

A. The ADA Claim

Title III of the ADA states that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases, leases to, or operates a place of public

[7] The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367. We have appellate jurisdiction under 28 U.S.C. § 1291.

accommodation." 42 U.S.C. § 12182(a). Peoples claims that DFS discriminated against him by failing to consider his blindness when addressing his fraud claim.

The Courts of Appeals are split on whether the term "public accommodation," as used in the ADA, refers to an actual physical structure or whether it has some broader meaning. *Compare Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 2000) (holding that an insurance company administering an employer-provided disability plan is not a place of public accommodation), *and Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612 (3d Cir. 1998) ("The plain meaning of Title III is that a public accommodation is a place ... ."), *and Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997) (holding that "a public accommodation is a physical place") *with Morgan v. Joint Admin. Bd., Ret. Plan of the Pillsbury Co.*, 268 F.3d 456, 459 (7th Cir. 2001) (refusing to interpret "public accommodation" literally, so as to "denot[e] a physical site"), *and Carparts Distribution Ctr., Inc. v. Auto. Wholesalers Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (holding that public accommodations are not limited to physical structures). Our court is among those that have taken the position that the term is limited to physical accommodations. *Ford*, 145 F.3d at 612. Despite Peoples's request that we "clarify or reconsider" our holding in *Ford* and extend our interpretation of public accommodations to include things other than physical places (Appellant's Op. Br. at 27), we are bound by our precedent. *See Pa.*

Ass'n of Edwards Heirs v. Rightenour, 235 F.3d 839, 844 (3d Cir. 2000) ("Under this Court's Internal Operating Procedures, we are bound by, and lack the authority to overrule, a published decision by a prior panel ... .") (citation omitted).

Under *Ford*, Peoples's argument fails because the communication between Dayle's credit card processing terminal and DFS is not a "public accommodation" within the meaning of the ADA. *See* 145 F.3d at 612 (holding that "[t]he plain meaning of Title III is that a public accommodation is a place ..."). As the District Court noted, "[t]he evidence is that [Peoples] used his Discover Card to pay for the transactions with Dayle at her apartment," and, "[t]hough [DFS's] credit services can be used by cardmembers at a merchant's place of accommodation, DFS itself does not own, lease or operate those locations." (App. at 6.) Thus, because DFS's alleged discrimination (i.e., the supposedly insufficient investigation of Peoples's fraud claim) in no way relates to the equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations on physical property that DFS, rather than Dayle, owns, leases, or operates, the District Court correctly granted summary judgment against Peoples on his ADA claim.[8]

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[8]As a practical point, we note again that DFS did provide 8 a telephone number available 24-hours a day, seven days a week, allowing those with vision impairments to check on charges to their accounts. *See supra* page 4.

B. The Rehabilitation Act Claim

Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability in the United States ... shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. § 794(a); *see also Disabled in Action v. Sykes*, 833 F.2d 1113, 1116 n.5 (3d Cir. 1987) ("Section 504 provides a private right of action to handicapped persons who are excluded from federally funded programs"). The District Court correctly granted summary judgment in favor of DFS on Peoples's claim under Section 504 of the Rehabilitation Act because Peoples failed to present any evidence showing that DFS is related to an executive agency or the United States Postal Service, or that it receives federal funds. Peoples claims for the first time on appeal that because "Discover Card"[9] received funds in 2009 from the government's financial sector bailout package, the company falls within the purview of Section 504. However, it is well established that "absent exceptional circumstances, issues not raised before the district court are waived on appeal." *Fletcher- Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 253

[9] Peoples uses the term "Discover Card" in his brief, presumably referring to DFS. (Appellant's Op. Br. at 28.) However, as noted by DFS, "Discover Card" is not an "entity but rather a credit card serviced by DFS[.]" (App. at 24.)

(3d Cir. 2007). There are no exceptional circumstances here. Peoples could have – but did not – present that argument to the District Court, although the information he relied on is dated eight months prior to the District Court's decision. We therefore decline to consider his argument in that regard and will affirm the District Court's grant of summary judgment against him on his Rehabilitation Act claim.

C. The Breach of Contract Claim

To establish a breach of contract claim in Pennsylvania, a plaintiff "must establish '(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract[,] and (3) resultant damages.'" *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 225 (3d Cir. 2003) (quoting *CoreStates Bank, N.A. v. Cutillo*, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999)). When Peoples obtained a Discover credit card, he and DFS entered into a contract known as the "cardmember agreement." In claiming that DFS did not conduct a reasonable investigation of the disputed transactions, Peoples does not point to any specific section of that agreement that DFS breached.[10] Presumably, he is relying on the provision pursuant to which DFS agreed that "[i]f a merchant fails to provide [a customer's] purchase to [his] satisfaction and [he] request[s] a credit to [his]

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[10] Peoples says, "[w]hether it is explicitly stated in written cardmember agreement [sic]or not, there is no question that [DFS] regularly conducted fraud investigations for customers and that that was a normal part of the customer-credit card company contractual relationship." (Appellant's Op. Br. at 9.)

Account, [DFS] will investigate the dispute." (App. at 76 (cardmember agreement at 10, under heading "Claims and Disputes").) In particular, he claims that DFS's investigation was unreasonable because it "appl[ied] its 'signed receipt' rule in an overly strict way that did not take account of obvious facts," including his blindness.[11] (Appellant's Op. Br. at 9.)

As an initial matter, it is questionable whether Peoples has any claim for breach of contract, given that he himself breached the cardmember agreement when he used his account to pay for prostitution in Pennsylvania. Pursuant to the cardmember agreement, he agreed not to use his account to pay "for any transactions that are unlawful where [he] reside[d] or where [he was] physically located when [he] use[d] the Account to initiate the transaction ('Prohibited Transactions')." (App. at 72.) In Pennsylvania, patronizing a prostitute is illegal. 18 PA. CONS. STAT. § 5902(e). Thus, even if DFS had breached its contract with Peoples by failing to reasonably investigate the disputed transactions, Peoples is arguably in no position to enforce the contract against DFS because he breached the contract prior to disputing the charges. *Cf. LJL Transp., Inc. v. Pilot Air Freight Corp.*, 962 A.2d 639, 648 (Pa. 2009) ("It is ... well established that '[a] party also may not insist upon performance of the contract when he himself is guilty of a material breach of the contract.'" (second

[11] It is likely that the "signed receipt" rule that Peoples refers to is DFS's policy of contacting the merchant in question and requesting that the merchant provide receipts documenting the charges in dispute.

alteration in original) (quoting *Ott v. Buchler Lumber*, 541 A.2d 1143, 1145 (Pa. 1988))).

Setting that aside, there is no indication that DFS did not properly conduct its investigation. When Peoples reported the dispute to DFS, the case initially went to a customer service section within the company that investigates disputes arising from alleged over-billing. As part of its investigation, a customer service representative contacted Dayle about the disputed transactions and received signed sales receipts and a contract showing that Peoples had engaged her to provide yoga or pilates services. The receipts showed that Peoples's account had been charged ten times for $1,100 and once for $1,600. Those amounts resembled other charges Peoples had previously paid for Dayle's services, which he was not contesting. Indeed, the record reflects that from March to September, Peoples paid $375 once, $750 eighteen times, $1,075 twice, and $1,100 twice. DFS thus concluded that the transactions Peoples complained about – and which he acknowledged had taken place – were sufficiently documented and consistent with prior usage of the account that there was an inadequate basis to declare that the amounts charged were fraudulent. Because Peoples continued to dispute the transactions, the investigation was re-opened by DFS's fraud investigation department. However, since DFS's definition of fraud is a charge that the customer did not authorize, or from which the customer received no benefit, the fraud unit likewise determined that no fraud occurred because Peoples clearly authorized Dayle to place a charge on his card and he acknowledged receiving some

benefit. As a result, DFS refused to credit Peoples's account for the alleged overcharges.[12]

Peoples has provided no evidence, beyond his say-so, that the sums he was charged were not agreed to. But, even assuming the facts were as he contends, that is beside the point. What is at issue is DFS's obligation to investigate a dispute between a "merchant" and a customer. Even with all inferences drawn in his favor, Peoples has not shown that DFS failed to reasonably inquire into the dispute.

In sum, Peoples has adduced no evidence to show that DFS failed to investigate his claim in a reasonable manner and in accordance with the company's established policies and procedures. We therefore agree with the District Court that there is no evidence that DFS breached a contractual duty to Peoples.

III. Conclusion

For the foregoing reasons, we will affirm the judgment of the District Court.[13]

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[12] Peoples evidently decided that he can seek redress from Dayle directly. He has filed a suit against her in the Civil Trial Division of the Court of Common Pleas of Philadelphia County, Pennsylvania, captioned *Peoples v. Dayle*, Docket No. 09-10-03340.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

JOHN F. PEOPLES	:
CIVIL ACTION	
	:
v.	:
	:No. 08-2024
	:
DISCOVER FINANCIAL SERVICES, INC., et al.	:

MEMORANDUM

Ludwig, J.
September 22, 2009

This is a contract and civil rights action arising from allegedly fraudulent credit card charges.[1]

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[1] Defendant Discovery Financial Services, Inc., now known as DFS Services LLC, issued a Discover Card to plaintiff John F. Peoples. DFS Answer, ¶ 5. Count One of the complaint asserts civil rights claims against DFS as follows: violation of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12182, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Pennsylvania Human Relations Act, 43 P.S. § 951. Complaint, ¶¶ 20-34. Count One also includes a claim for breach of the Cardmember Agreement that sets forth the terms and conditions of plaintiff's account with DFS.

The complaint alleges that defendants Ginger Dayle, Ginger Dayle Productions (a Pennsylvania corporation), and New City Stage Company (a trade name) provided services to plaintiff in exchange for payment. Complaint, ¶¶ 6, 12-13; Dayle Answer, ¶ 8. Count Two of the complaint asserts state law claims against the Dayle defendants as follows: violation of Pennsylvania's

The parties filed cross-motions for summary judgment.[2] Judgment will be granted in favor of DFS and against plaintiff on the civil rights claims and the breach of contract claim against DFS.[3] Inasmuch as no independent basis exists for the exercise of federal jurisdiction over plaintiff's state law claims or the Dayle defendants' counterclaim, those claims will be dismissed without prejudice to filing in state court.

According to the complaint, beginning in March 2007, plaintiff John F. Peoples, a blind person, relied on defendant Ginger Dayle to enter agreed upon amounts on his credit card receipts, but in several instances she entered larger amounts, which were charged to plaintiff's Discover Card. Complaint, ¶¶ 4-

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Unfair Trade Practices and Consumer Protection Law, common law fraud, and breach of contract. Complaint, 35-40. The Dayle defendants counterclaimed against plaintiff for battery and intentional infliction of emotional distress.

[2]"Summary judgment is appropriate only 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.' Fed.R.C.P. 56(c). The facts must be viewed in the light most favorable to the non-moving party and all reasonable inferences must bedrawn in that party's favor." *Caplen v. SN Servicing Corp.*, 2009 WL 2713979, *2 (3d Cir., filed Aug. 31, 2009*), citing Conopco, Inc. v. United States*, 572 F.3d 162, 165 (3d Cir

[3] Plaintiff's request for further discovery is denied. Plaintiff did not submit an affidavit as required under Fed. R. Civ. P. 56(f) stating why he cannot present facts in opposition to DFS' motion, or proffer any discovery that would result in the discovery of further evidence supporting his claim.

5, 12-15. Plaintiff unsuccessfully disputed the overcharges as fraudulent, and Count Two of the complaint sets forth that the Dayle defendants defrauded him. Id., ¶¶ 15, 16, 36-40. As to DFS, his civil rights claim is that his disability was not reasonably accommodated by DFS so as to prevent his being defrauded, and, as a result, he has been discriminated against and deprived of civil rights in violation of the ADA, the Rehabilitation Act, and the PHRA. Id., ¶¶ 23-28. The relevant facts of record[4] are as follows:

As alleged, in March 2007, plaintiff began purchasing services from defendant Ginger Dayle. April 2007 Discovery billing statement, Exhibit "D" to DFS' motion. At his deposition, plaintiff described these services as prostitution: "I paid her and she had sex with me and there was an understanding that it was payment for sex." Deposition Transcript of John Peoples, at 5, Exhibit "B" to DFS' motion.[5] The

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[4] The summary judgment record includes the pleadings, responses to interrogatories and document requests, affidavits, and plaintiff's deposition.

[5] It does not appear that plaintiff told DFS that he was purchasing prostitution services at the time he disputed the charges. Affidavit of Misty Holdman, Staff Associate for DFS, ¶ 13, Exhibit "E" to DFS' motion. Moreover, the complaint makes no reference to prostitution, describing Dayle as a "service provider, providing personal, private sessions with clients for a predetermined per-session fee. She is not a doctor, nurse or licensed medical practitioner. She advertises herself at [sic] an expert at providing personal, hands-on service to individual customers in private sessions at a set rate." Complaint, ¶ 6. Further, in response to DFS' requests for admissions and interrogatories, plaintiff did not admit that he was purchasing

encounters took place in Dayle's apartment and were paid for by charges to plaintiff's credit card, which plaintiff gave to Dayle when she filled out the credit charge receipts. Peoples N.T. at 6, 16. He signed the receipts that she had prepared, but he could not see them. Complaint, ¶ 13. By November 2007, plaintiff had entered into at least 25 such transactions with Dayle, and plaintiff disputed 11 of them that occurred in October and November as overcharges - 10 at $1,110 each, and one at $1,600. Peoples N.T., 5, 53; complaint, ¶¶ 12-14.[6] All of plaintiff's testimony in these regards is credited as true.

On plaintiff's breach of contract claim, defendant DFS contends that it is entitled to judgment as a matter of law because plaintiff's purchase of prostitution services was unlawful and, therefore, a "prohibited transaction," which constituted a breach of the Cardmember Agreement. See Cardmember Agreement, at 2-3, Exhibit "F" to DFS' motion ("Your Account may not be used to . . . or for any transactions that are unlawful where you reside or where you are physically located when you use the Account to initiate the transaction ('Prohibited

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prostitution services. Exhibits "G" - "J" to DFS' reply. It was not until his October 23, 2008 deposition that plaintiff stated that the charges were for prostitution.

[6] Plaintiff does not dispute prior charges for the same type of services from $375 to $1,100. Holdman affidavit, ¶¶ 4-7. Plaintiff acknowledges that Discover Card members can have a customer services representative check a transaction before a receipt is signed, but he did not attempt to do so. Peoples N.T., 67-68; Holdman affidavit, ¶¶ 8, 9.

Transactions').") Under Pennsylvania law, patronizing a prostitute is illegal. 18 Pa.C.S. § 5902(e). Plaintiff testified that the charges in dispute were for prostitution services, Peoples N.T., at 5, 73, and, consequently, he cannot recover based on them.

Moreover, plaintiff has not presented any evidence to show that DFS did not fulfill its Cardmember Agreement duties to him. His argument that DFS should have been alerted to question the charges in October and November because they were not consistent with those in the preceding six months is without merit. Plaintiff agrees that he had authorized two $1,100 charges before the ten he disputes. There is no genuine issue of material fact as to this claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986) ("[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient" basis on which to deny summary judgment). Judgment must be granted in DFS's favor and against plaintiff on the breach of contract claim.

Defendant also asserts that it is entitled to judgment on plaintiff's ADA claim because Discover Card services cannot be said to constitute a "public accommodation" as set forth in Title III. "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases, leases to, or operates a place of public accommodation." 42 U.S.C. § 12182(a). "The plain meaning of Title III is that a

public accommodation is a place. . . . [P]laintiff cannot point to these terms [goods, services, facilities, privileges, advantages, or accommodations] as providing protection from discrimination unrelated to places." *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-13 (3d Cir. 1998) (disability benefits do not qualify as a public accommodation). *See also Access Now, Inc. v. Southwest Airlines Co.*, 227 F.Supp.2d 1312 (D. Fla. 2002) (goods and services offered by airline at "virtual ticket counter" do not fall within Title III - internet websites are not places of accommodation); *aff'd* , 385 F.3d 1324, 1329 (11th Cir. 2004) ("plaintiffs must show that these 'physical facilities' exist and that they bear a reasonable 'nexus' or connection with Southwest.com that subjects it to the public accommodations requirement of Title III.").

The evidence is that plaintiff used his Discover Card to pay for the transactions with Dayle at her apartment. Though its credit services can be used by cardmembers at a merchant's place of accommodation, DFS itself does not own, lease or operate those locations.[7] Because there is no connection here

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[7] DFS also asserts that Dayle's apartment, 7 a private residence, is not subject to the public accommodation requirements of Title III. *Independent Housing Services of San Francisco v. Fillmore Center Assocs.*, 840 F. Supp. 1328, 1344 n.14 (N.D. Cal. 1993)("the legislative history of the ADA clarifies that 'other place of lodging' does not include residential facilities.") Plaintiff counters that the apartment is a place of business, where Dayle sells her services, and is, therefore, a place of public accommodation. This does not, however, speak to the deficiency in plaintiff's position - though DFS' credit services may be used in a place of public accommodation, they are not themselves places

between the services offered by DFS and a physical place of accommodation, plaintiff's Title III claim must be dismissed.

As to plaintiff's Rehabilitation Act claim, Section 504 of the Rehabilitation Act provides protection against discrimination as follows: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. § 794(a). *See also Disabled in Action v. Sykes,* 833 F.2d 1113, 1116 n.5 (3d Cir. 1987) ("Section 504 provides a private right of action to handicapped persons who are excluded form federally funded programs."). According to the affidavit of Misty Holdman, Staff Associate for DFS Services LLC's Consumer Advocacy Group, DFS "is a wholly owned subsidiary of Discover Financial Services, a publicly traded, independent company." Holdman Affdavit, ¶ 2. There is no evidence that it is related to any executive agency or the United States Postal Service, or that it receives federal funds. Accordingly, as a matter of law, it is not subject to the requirements of the statute, and judgment must be granted in DFS's favor and against plaintiff on the Section 504 claim.

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of public accommodation, or sufficiently linked to those places to make them subject to the requirements of the ADA.

As to plaintiff's PHRA claim, DFS urges dismissal because plaintiff did not exhaust his administrative remedies - he did not file a complaint with the Pennsylvania Human Relations Commission within 180 days of the alleged discriminatory conduct described in his complaint. *Richards v. Foulke Assocs.*, 151 F.Supp.2d 610, 612-13 (E.D. Pa. 2001), citing 43 Pa.C.S. §§ 959(a), 962 ("To bring suit under the PHRA, a plaintiff must first have filed an administrative complaint with the PHRC within 180 days of the alleged act of discrimination.") Plaintiff responds, without authority, that his completion of DFS' internal fraud claim process satisfied PHRA's administrative requirements, and that the requirements cited by defendant are applicable only in the employment discrimination context. These positions, however, are incorrect. *See Douris v. Genuardi's Family Markets,* 2004 WL 2137821, *3 (E.D. Pa., filed Sept. 22, 2004) (granting summary judgment to defendant grocery store in action alleging accessibility problems where plaintiff did not exhaust remedies under PHRA); *Bethea v. Michael's Family Restaurant and Diner*, 2001 WL 722566, *4 (E.D. Pa., filed June 26, 2001) (granting motion to dismiss in favor of defendant restaurant in action alleging race discrimination in serving patrons where plaintiffs did not exhaust remedies under PHRA). Because plaintiff did not exhaust his administrative remedies as required, his PHRA claim must be dismissed.

Also pending are cross-motions for summary judgment by plaintiff and the Dayle defendants. Issues of material fact predominate these motions, rendering summary judgment inappropriate. As to plaintiff's claim that he purchased prostitution

services from her and was overcharged, defendant Dayle's position is that the services were for physical fitness instruction, and plaintiff was not defrauded. Dayle answer, ¶¶ 8, 13, 14. The counterclaim alleges that plaintiff made sexual advances and grabbed Dayle without her permission. Counterclaim, ¶¶ 3, 4. Additionally, she claims he filed the present claims against her because she refused his sexual advances. Id., ¶¶ 6-8. Plaintiff denies these allegations. Answer to counterclaim, ¶¶ 3-8.

"The rule within this Circuit is that once all claims with an independent basis of federal jurisdiction have been dismissed the case no longer belongs in federal court." *Markowitz v. Northeast Land Co.,* 906 F.2d 100, 106 (3d Cir. 1990) (citations omitted). *See also Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 788 (3d Cir. 1995) ("where the claim over which the district court has original jurisdiction is dismissed before trial, the district court must decline to decide the pendent state claims unless consideration of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so.")

Here, principles of judicial economy do not provide a justification for exercising jurisdiction over plaintiff's or the Dayle defendants' state law claims. There are no extraordinary circumstances warranting the exercise of federal jurisdiction. Plaintiff's state law claims and the Dayle defendants' counterclaim will be dismissed without prejudice. Those claims may be filed in state court. See 42 Pa.C.S.A. § 5103(b)

(governing transfer of action from federal to state court following dismissal for lack of jurisdiction).

BY THE COURT:
/s/ Edmund V. Ludwig

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-3991

JOHN F. PEOPLES,
Appellant

v.

DISCOVER FINANCIAL SERVICES, INC.;
DISCOVER CARD SERVICES, INC., trading as
Discover Card; GINGER DAYLE; GINGER DAYLE
PRODUCTIONS; NEW CITY STAGE COMPANY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 08-cv-2024)
District Judge: Hon. Robert F. Kelly

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

Present: McKEE, Chief Judge, SLOVITER,
SCIRICA, RENDELL, BARRY, AMBRO, FUENTES,
SMITH, FISHER, CHAGARES, JORDAN,
HARDIMAN, GREENAWAY, JR., and VANASKIE,
Circuit Judges

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED.

BY THE COURT:

/s/ Kent A. Jordan
Circuit Judge

Dated: August 17, 2010

John Peoples v. Discover Fin Ser Inc, et al.

dwb/cc:
Stephen H. Cristal, Esq.
Martin C. Bryce, Jr., Esq.
Benjamin M. Schmidt, Esq.